NO. 42582-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

PHILIP JOSE GONZALEZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

The State essentially agrees with appellant's Statement of the Case with the following corrections and additions.

The motion to suppress was heard in front of Judge Dave Edwards, not Judge Mark McCauley.

There was a deck off the back of the apartment about 8 to 10 feet above the ground that would provide an avenue of escape for someone in the apartment. In fact, Schrader testified that "[a]fter interviewing all of persons there at the residence, it was determined that somebody did jump off of that balcony and flee from us." 8-26-11 RP 11-12.

The description of the vehicle at the Grayland robbery matched the description of Mr. Gonzalez's vehicle and at least the first four numbers and/or letters of the license plates of the two vehicles also matched. 8-26-11 RP 7-8.

DISCUSSION

1. Standard of Review

Findings of Fact are reviewed to determine if they are supported by substantial evidence (that being evidence sufficient to persuade a fair-minded person of the truth of the stated premise) and if they support the Conclusions of Law. State v. Moore, 73 Wn.App. 805, 871 P.2d 1086 (1994); State v. Graffius, 74 Wn.App. 23, 871 P.2d 1115 (1994). The appellate court does not independently evaluate the evidence as the trier of fact is in a better position to assess the credibility of witnesses, take

evidence and observe the demeanor of those testifying. State v. Hill, 123 Wn.2d 641, 646, 870 P.2d 313 (1994). "Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." Hill, at 647. Conclusions of Law are reviewed de novo. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

2. Exigent Circumstances

As a general rule, warrantless searches and seizures are *per se* unreasonable, in violation of the Fourth Amendment and Article 1, § 7 of the Washington State Constitution. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). There are, however, a few "jealously and carefully drawn exceptions to the warrant requirement that provide for those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk or loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L.Ed.2d 235 (1979)). Exigent circumstances constitute one of those exceptions. State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). "The rationale behind the exigent circumstances exception 'is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence."' State v. Smith,

165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Audley, 77 Wn.App. 897, 907, 894 P.2d 1359 (1995)).

To prove that exigent circumstances are present, the State must be able to "point to specific, articulable facts and the reasonable inferences therefrom which justify the intrusion." State v. Dianna, 24 Wn.App. 908, 911, 604 P.2d 1312 (1979).

In determining whether or not an exigent circumstance exists courts consider a number of relevant factors:

> (1) The gravity or violent nature of the offense which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) There is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably.

State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127 (2002). These factors are not exclusive and have been supplemented with additional factors:

> (1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence.

State v. Flowers, 57 Wn.App. 636, 643, 789 P.2d 233 (1990). Because the court must analyze the totality of the situation, circumstances may be "exigent" even if they do not satisfy all of the listed factors. Cardenas, at 408. "[I]t is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers

needed to act quickly." Cardenas, *Id.*

In Cardenas, supra, two Yakima police department officers responded to a report of a robbery arriving within minutes of the call. The officers were told that two men, one white and one Hispanic, had forced their way into an apartment and robbed the occupants. Taken was jewelry, money, a television, and a VCR, along with some clothes. The victims thought one of the two men may have been armed with either a knife or a gun. The victims told the officers that the men had fled only moments earlier in a large vehicle like a Ford Torino with a different color passenger door, possibly orange.

Information regarding the robbery was broadcast over the police radio. While still at the scene, they were informed by dispatch that a security guard at a local motel had seen a vehicle matching the description of the car pull into the motel parking lot. The officers responded to the motel and found a brown 1970 Pontiac Le Mans with a blue door parked in the front of room 8. The hood of the car was still warm. In the backseat there was some clothing items and possibly a VCR. Officers were told that the occupants of the vehicle had entered room No. 3. The curtains on the window on room No. 3's window were drawn, but there was a 3 inch gap in the curtains. One of the officers bent down and put his face close to the window to look inside. He saw two males, one Hispanic and one white, leaning over the bed sorting through papers, including credit cards. One of the officers knocked on the door but did not announce "police."

Another officer reported that the suspects had darted to the back of the room following the knock. Although the window in the back of the motel was too small for someone to crawl through Officer Castio decided to enter the room. He slid the window open and pulled the curtains aside. He saw both suspects but observed no weapons. He then "pointed his gun inside, yelled get your hands up, and jumped through the window." Cardenas, at 2002. Cardenas and his co-defendant were then arrested.

The court found that the officer's entry into the room was justified by exigent circumstances. The court considered the six factors and found that all had been satisfied other than No. 5, the likelihood of escape:

> Although Cardenas does not take issue with factors (1) and (2), we agree with the trial court's conclusion that a serious felony, armed robbery, had been committed and that the officers had reason to believe the suspects may have been armed. We also agree with the trial court that factor (3) is satisfied. As the trial court noted in its factual findings, officers responded to the robbery scene within minutes of the incident. The victims reported they had just been robbed by two men. They gave a description of the items taken and the suspect vehicle. Shortly after broadcasting that information, police received a call from the Western Motel reporting the arrival of the suspect vehicle. While the vehicle did not have an orange door, it substantially matched the description given by the victims. It was a large, brown American car with a different color passenger door. Officers arrived at the motel within minutes of the report and located the vehicle. Its hood was still warm. The officers testified that the contents of the backseat matched the description of property taken from the

> victims. Although the items taken in isolation may not have been unusual, their presence under the circumstances permits a reasonable inference that the items were the same ones taken in the earlier robbery. Additionally, two witnesses at the motel had seen two men hurrying from the car into room 3.
>
> Accordingly, we find that the court's conclusion on factor (3) is supported by the court's findings. Similarly, factor (4) is satisfied based on the findings as recited above.
>
> Apart from the officers' observations made through the parted curtain, there is little to support the conclusion that the suspects were likely to escape unless swiftly apprehended. Thus, without the observations made by officers through the curtain opening, factor (5) is doubtful. Nevertheless, it is not necessary that every factor be met to find exigent circumstances, only that the factors are sufficient to show that the officers needed to act quickly. *See, e.g., State v. Patterson,* 112 Wn.2d 731, 736, 774 P.2d 10 (1989) (no one factor is conclusive; weight varies with circumstances); *State v. Flowers,* 57 Wn. App. 636, 789 P.2d 333 (1990) (fact that some factors not present is not controlling). Finally, factor (6) is satisfied here. Police were in full uniform and yelled, "get your hands up," placing the occupants on notice that the intruders were law enforcement officers, thus reducing the potential for violence. The police did not break down the door but entered through an unlocked window. As the trial court found, the potential for harm was low. Weighing the *Terrovona* factors, we conclude that exigent circumstances justified the entry in this case, even if we accept Cardenas' claims.

Cardenas, at 407-408.

In Flowers, supra, a restaurant employee was robbed at about 5:00 p.m. on July 4, 1988, while making a night deposit at a bank at the Aurora Village Mall. This robbery was reported to police. A description of the suspects and their vehicle (a black Volkswagen Rabbit) was broadcast along with the fact that the male had a short-barreled handgun and that shots were fired. This report was heard by a Seattle police officer about 6 miles south on Aurora Avenue. Prior to hearing the report, the officer had seen a black Volkswagen type car pull into a motel on Aurora Avenue. The car had two black occupants. The officer returned to the motel to talk to the clerk. The clerk's description of the vehicle occupants matched the earlier broadcast and further information that it had been broadcast since that time.

Other officers had arrived by this time. They had clerk call room 6 and tell them he needed additional information for their registration. A woman exited room 6 a short time later and was immediately confronted by the officers. When this happened, she turned and yelled back to room 6, "Police!" In response, Flowers opened the curtains of the motel room and saw Seattle Police Officer Dave Emrick with his gun drawn. Emrick ordered Flowers out of the room and down on his knees where he was taken into custody.

Flowers contended that by ordering him out of the room at gun point the officers escalated the encounter into a warrantless entry and arrest not supported by exigent circumstances. In response, the court held

as follows:

> Here, the exigent circumstances justified the warrantless "entry." Robbery is a "grave offense" and the police officers reasonably believed the suspects to be armed and willing to use a gun. The rapidly unfolding situation presented a potential danger to the investigating officers, the suspects, and the public. Once Flowers had been alerted to the officers' presence, the possibility that some evidence might be destroyed was increased. The "entry" here was peaceable and less intrusive than had the police physically entered the room to arrest the suspect. Finally, the officers did not intend to arrest the occupants of room 6 when the investigation began. The fact that some of the factors are not present ins an individual case is not controlling.

Flowers, at 643-644. (citations omitted).

In State v. Mueller, 15 Wn.App. 667, 552 P.2d 1089 (1976) Bremerton police officers and Kitsap County deputies went to a Bremerton apartment to execute a search warrant for controlled substances. They had information that a party was progress and that drugs were in use. They approached the apartment through an interior hallway which terminated at an open kitchen door leading directly to the apartment kitchen. The officers recognized one of the persons in the kitchen from prior drug related encounters. When the officers were about 10 feet from the doorway this person saw the officers and appeared to recognized them. He immediately backed toward the living, running into some tables. The officers thought he was attempting to alert others whom the officers feared would try to destroy any drugs on the premises. Mueller, who was

ultimately arrested, charged and convicted, contended the search warrant was illegally executed because the officers failed to comply with the knock-and-announce rule. The trial found that exigent circumstances exist because it was likely that the occupant of the apartment was attempting to warn the others of the officers' presence which would lead to the destruction of evidence:

> An unannounced entry, where possible destruction of evidence is in question, will be upheld only where the intruding officers were confronted with some sort of contemporaneous sound or activity alerting them to probable immediate or actual destruction of evidence.

Mueller, at 670.

While there might have not been an actual arrest while Schrader conducted his "protective sweep" (State v. Hopkins, 113 Wn.App. 954, 55 P.3d 691 (2002)), the court may properly affirm a trial court judgment on any basis established by the pleadings and supported by the record. In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003).

In the case at hand, a number of factors justifying exigent circumstances were present. Robbery is a serious offense. Although there was no allegation that the suspects were armed during the robbery, Deputy Schrader knew that Mr. Gonzalez had a concealed weapons permit and had recently purchased firearms. In addition, while standing at the apartment door he heard a discussion about both firearms and drugs. While the participants in the robbery could not be identified, there was at

least a reasonable suspicion that Mr. Gonzalez may have been involved or that his vehicle may have been used. Ms. Peters said that she was familiar with Mr. Gonzalez's vehicle and that the one that she saw could have been his. The license plate that she gave to the officers was close to Mr. Gonzalez's license plate number (vehicle with blue door instead of orange door, *Cardenas, supra*). As in Cardenas, the hood of Mr. Gonzalez's vehicle was warm to the touch.

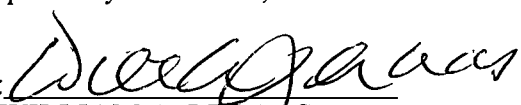
When Gonzalez opened the door Schrader could smell the odor of marijuana and heroin. He heard other suspects rushing to other areas of the apartment. He had announced his presence and presumably the other persons in the apartment heard him. There was a real possibility that they would escape via the patio door or destroy evidence (heroin and marijuana). There was a real danger that if there were weapons in the apartment they could arm themselves.

CONCLUSION

For all the foregoing reasons, appellant's conviction should be affirmed.

DATED this 26 day of June, 2012.

Respectfully Submitted,

By: 

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, v. PHILIP JOSE GONZALEZ, Appellant.	No.: 42582-3-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 3rd day of July, 2012, I mailed a copy of the Brief of Respondent to Peter B. Tiller, Attorney at Law, P. O. Box 58, Centralia, WA 98531-0058, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 3rd day of July, 2012, at Montesano, Washington.

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